Supreme Court, U.S.
FILED

05-691 NOV 23 2005

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 2005

BOBBY RAY SMART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TAMERA K. ERSKINE
101 Park Place Way
Alabaster, Alabama 35007
(205) 620-1233

Counsel of Record

OF COUNSEL:
Randy A. Dempsey
Dempsey, Steed, Stewart,
Maddox & Gache, LLP
1122 22nd Street North
Birmingham, Alabama 35234
(205) 328-0162

QUESTIONS PRESENTED

1. Whether the Petitioner was denied due process and equal protection of the law due to there being a split among the circuits as to whether the payment of money by a drug dealer to a drug supplier constitutes money laundering under U.S.C. 1956(a)(1)(A)(i)?

2. Did the Eleventh Circuit effectively decide this issue in Smart's case without issuing an opinion?

3. Is the Eleventh Circuit's opinion in conflict with their previous decisions related to this issue?

LIST OF PARTIES

The parties below are listed in the caption of this case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED....i

LIST OF PARTIES....ii

TABLE OF CONTENTS....iii

TABLE OF AUTHORITIES....v

OPINIONS BELOW....1

STATEMENT OF JURISDICTION....1

CONSTITUTIONAL PROVISIONS....1

STATEMENT OF THE CASE....2

REASONS FOR GRANTING THE WRIT....3

I. Review is warranted to resolve a conflict among the Circuits as to whether the payment of money by a drug dealer to a drug supplier constitutes money laundering under 18 U.S.C. 1956(a)(1)(A)(i)....7

A. Facts....7

B. Deprivation of due process and equal protection by the trial court's and the Eleventh Circuit Court of Appeals' failure to follow other circuits who have decided this issue according to Congress' legislative intent....9

C. The Eleventh Circuit's failure to reach this issue in Smart's case allows them to be in conflict with their previous decisions without issuing an opinion on this specific issue and gives the prosecution an unfair second "bite at the apple" when they fail to prove the underlying drug charge, thereby subjecting the defendant to being punished for the same conduct for which he was found not guilty.....13

CONCLUSION.....15

APPENDIX.....A-1

TABLE OF CITED AUTHORITIES

CASES:

United States v. Baker,
63 F.3d 1478 (9th Cir. 1995).....6

United States v. Calderon,
169 F.3d 718 (11th Cir. 1999).....7

United States v. Carcione,
272 F.3d 1297 (11th Cir. 2001).....4,6,14

United States v. Christo,
129 F.3d 578 (11th Cir. 1997).....3,6,13

United States v. Conley,
37 F.3d 970 (3d Cir. 1994).....6,8,13

United States v. Dimeck,
24 F.3d 1239 (10th Cir. 1994).....4,11

United States v. Dovalina,
262 F.3d 472 (5th Cir. 2001).....5,12

United States v. Edgmon,
952 F.2d 1206 (10th Cir. 1991).....11

United States v. Heaps,
39 F.3d 479 (4th Cir. 1994).....4,5,11

United States v. King,
169 F.3d 1035 (6th Cir. 1999).....6

United States v. Mankarious,
151 F.3d 694 (7th Cir. 1998).....4,9,12

United States v. Montoya,
945 F.3d 1068 (9th Cir. 1991).....6,12

United States v. Piervinanzi,
23 F.3d 670 (2nd Cir. 1994).....6,13

STATUTES:

Title 18, *United States Code,*
§1956(a)(1)(A)(i).....1,2,3,7,8,9,10,11,13,14,15

Title 18, *United States Code,*
§1956(a)(1)(B)(i).....2,7,8,11

Title 18, *United States Code,*
§ 1956(h).....2,7

Title 21, *United States Code,*
§841(b)(a)(A).....2

Title 21, *United States Code,*
§846.....2

*Title 28, *United States Code,*
§1254(1).....1

OTHER AUTHORITY:

Fenningham, Maura E.,
A Full Laundering Cycle is Required: Plowing Back the Proceeds to Carry on Crime IS the Crime Under 18 U.S.C. §1956(a)(1)(A)(i).
70 Notre Dame L. Rev. 891 (1994-95).....9,10

Kacarab, Peter J.,
An Indepth Analysis of the New Money Laundering Statutes, 8 Akron Tax J. 1 (1991).....15

H.R. Rep. No. 855, 99th Cong., 2d Sess. 13 (1986).....10

S. Rep. No. 433, 99th Cong., 2d Sess. 4 (1986).....10

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was released on June 16, 2005 and is unpublished. A Petition for Rehearing was denied on August 25, 2005. *See* Appendices A-1 and A-2.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Eleventh Circuit's opinion was rendered on June 15, 2005. Smart's Petition for Rehearing *En Banc* was denied on August 25, 2005 and his Motion to Recall Mandate and Stay Execution was denied on October 11, 2005. *See* Appendices A-1 through A-3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §1956(a)(1)

Laundering of Monetary Instruments

(a)(1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity -

(A)(i) with the intent to promote the carrying on of specified unlawful activity....

STATEMENT OF THE CASE

The Petitioner, Bobby Ray Smart, asserts in this case that there is a conflict among the Circuits as to whether the payment of drug proceeds by a drug dealer to a drug supplier constitutes money laundering under 18 U.S.C. 1956(a)(1)(A)(i). Smart argues that the Circuits which have found that money paid to a drug supplier for drugs cannot be the basis for a conviction under §1956(a)(1)(A)(i), are correct because proof of money laundering must be separate from the proof required for conviction of the underlying offense of drug trafficking. In formulating their opinions, these Circuits are in alignment with the legislative intent of Congress by holding that "promotion" money laundering offenses could not be established by a single buyer's repeated payments to a drug distributor and the concept of "fronting" drugs to a dealer by a distributor does not reach the intent of Congress when they passed this provision.

Smart was indicted on two counts of a four-count second Superseding Indictment on May 1, 2003. He was charged in Count One with violating 21 *USC* 846 and 841(b)(a)(A), conspiracy to possess with the intent to distribute more than 500 grams of methamphetamine, and in Count Four with violating 18 *USC* 1956(h), conspiracy to launder proceeds of an unlawful activity under 1956(a)(1)(A)(i) *and* (a)(1)(B)(i), the "promotion" and "concealment" provisions, respectively. Smart entered a plea of Not Guilty on May 7, 2003 and the case proceeded to trial before the Honorable L. Scott Coogler, on September 8, 2003. Smart was acquitted of Count One, wherein it was alleged that between October of 1999 August of 2002, he, along with 15 other co-defendants, conspired with each other to possess with the intent to distribute more than 500 grams of methamphetamine. Smart was found *not guilty* of this offense by a jury on September 12, 2003. He was found guilty on that same date of conspiring to launder money

from the proceeds of the activity charged in Count One. During the trial, the prosecution effectively abandoned the "concealment" provision of the charge. On September 22, 2003, Smart filed a Motion for Judgment of Acquittal which was denied on September 25, 2003. Sentencing was re-scheduled on several occasions. On February 17, 2004, Smart filed an Addendum to the PSI and Renewed Motion for Judgment of Acquittal. Sentencing was held on April 20, 2004 and Smart received a term of imprisonment of 151 months on Count Four. Smart gave Notice of Appeal and the trial court set Smart's Motions for Acquittal and for appeal bond for a hearing. On July 22, 2004, the trial court denied the Motion for Judgment of Acquittal on jurisdictional grounds but did not address the merits.

On June 16, 2005, and Eleventh Circuit panel opinion was released affirming Smart's conviction. He filed a Petition for Rehearing *En Banc* which was denied on August 25, 2005. His Motion to Recali Mandate and Stay Execution was denied on October 11, 2005.

REASONS FOR ALLOWANCE OF THE WRIT

The Eleventh Circuit has not decided whether the payment of money by a drug dealer to a drug supplier for drugs that were previously "fronted" to the dealer on consignment, as alleged in this case, constitutes money laundering under §1956(a)(1)(A)(i). In construing §1956, however, the Eleventh Circuit has determined that money laundering must be punished separately from an underlying criminal offense, and therefore the underlying offense must have been completed before any act of laundering can occur. United States v. Christo, 129 F.3d 578, 579-80 (11th Cir. 1997) (per curiam). The Eleventh Circuit has also decided that financial transactions involving illegally obtained funds which advance ongoing criminal conspiracies constitutes money laundering under §1956,

See, e.g., United States v. Carcione, 272 F.3d 1297, 1303 (11th Cir. 2001), they have not decided in the context of "fronting" drugs when the underlying offense has been completed and the subsequent payment of proceeds to the supplier constitutes laundering. Keeping in mind that Smart was found not guilty of the underlying criminal offense, this is a very important questions to resolve among the circuits and even among the Eleventh Circuit itself, in its seemingly conflicting positions of affirming Smart's conviction, while failing to reach the ultimate issue. They have effectively given an opinion without issuing a holding on this issue.

The Tenth Circuit, in United States v. Dimeck, 24 F.3d 1239, 1246 (10th Cir. 1994), held that a money laundering conviction cannot be supported solely on the basis of a courier's activity because the delivery of money did not result in the kind of transaction prohibited by §1956(a)(1)(B)(i). Dimeck's conviction was based on the delivery of alleged drug money to another person who was to deliver it to the seller of the drugs. In reaching its conclusion, the Dimeck court analyzed the congressional intent of §1956(a)(1) as a whole and concluded that this type of conduct was not what the legislature was prohibiting under this statute.

The Seventh Circuit has also reached the same conclusion. In United States v. Mankarious, 151 F.3d 694, 705 (7th Cir. 1998), the court held that the transaction or transactions that created the criminally-derived proceeds must be distinct from the money-laundering transactions, because the money-laundering statutes criminalize "transaction[s] in proceeds, not the transaction[s] that create[] the proceeds."

The Fourth Circuit, in United States v. Heaps, 39 F.3d 479 (4th Cir. 1994), spoke to the argument in Smart's case, that the Government weakly addressed through the

testimony of Fowler, regarding how drug operations work. In Heaps, the Government tried to argue that the transfer of money was intended to promote the carrying on of unlawful activity, first, to establish goodwill to promote future sales of drugs and, second, that the transfers completed the prior drug distributions. As in Smart's case, no Government witness testified that the payment was made to create goodwill for subsequent drug transactions. The payment was merely to satisfy a debt of a completed transaction. The court also found the second argument to be without merit.

> Were the payment for the drugs itself held to be a transaction that promoted the unlawful activity of that same transaction virtually every sale of drugs would be an automatic money laundering violation as soon as the money changed hands. Understood this way, §1956 would have such a reach that it would criminalize the very same conduct already criminalized by the drug laws.

Heaps at 485-86.

The Fifth Circuit went a step further and held that "[A] promotion money laundering offense cannot be established merely by evidence of a single buyer's repeated payments to a distributor." United States v. Dovalina, 262 F.3d 472 (5th Cir. 2001)

All of these Circuits looked to the legislative intent of Congress in formulating their opinions. Even taken in the best light to the Government, it is clear in this case that they did not prove both the concealment and promotion elements alleged in the indictment. This court should address the sparse authority available in this circuit and reverse the trial court's decision denying Smart's motions for a judgment of acquittal.

Other Circuits have held opposite the Fourth, Fifth, Seventh and Tenth Circuits with regard to this issue. The Sixth Circuit concluded that "[p]ayment for drugs may constitute 'promotion' for the purposes of the money laundering statute when such payment encourages further drug transactions." United States v. King, 169 F.3d 1035, 1039 (6th Cir. 1999).

The Ninth Circuit held similarly in United States v. Baker, 63 F.3d 1478, 1494 (9th Cir. 1995), *citing* United States v. Montoya, 945 F.2d 1066, 1076 (9th Cir. 1991). "The government presented abundant evidence of payment [the defendant] made...for the purchase of contraband cigarettes. [The defendant] could not have continued the illegal trafficking without paying his cigarette suppliers."

The Second Circuit in United States v. Piervinanzi, 23 F.3d 670, 681 (2nd Cir. 1994), concluded that the "language [of §1956(a)(1)(A)(i)] applie[s] to the transportation of money orders to pay for purchases of cocaine."

In addressing a double jeopardy claim, the Third Circuit concluded "that Congress did intend to impose a further punishment under §1956 for using the proceeds of an illegal gambling business to promote that illegal activity." United States v. Conley, 37 F.3d 970, 972 (3rd Cir. 1994)

The split among the Circuits requires resolution. The Eleventh Circuit's failure to rule on Smart's issue effectively creates a holding without them having issued an opinion on this matter. It is in conflict with their opinions in Christo and Carcione. It also creates a conflict when Smart was found not guilty of the underlying drug charge, yet the money from that drug charge is the basis for the money laundering conviction. Clearly, this conflict is only created

because of the misinterpretation of the law as Congress intended it to be applied.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE PAYMENT OF MONEY BY A DRUG DEALER TO A DRUG SUPPLIER CONSTITUTES MONEY LAUNDERING UNDER §1956(a)(1)(A)(i).

A. Facts

This is a case appealing a conviction for conspiracy to commit money laundering in violation of 18 *USC* 1956(h) and 1956(a)(1)(A)(i) and (B)(i), the "promotion" and "concealment" provisions of money laundering. The government effectively abandoned the (B)(i) "concealment" prong of the Indictment during trial. Smart's argument, therefore, focuses on the "promotion" prong. Smart was also charged with conspiracy to possess with the intent to distribute methamphetamine, but was found *not guilty* of this charge.

In United States v. Calderon, 169 F.3d 718, 721 (11th Cir. 1999), this Court noted the four core elements of §1956(a)(1):

> To obtain a conviction on a substantive §1956(a)(1)(A)(i) promotion charge, the Government bears the burden of proving beyond a reasonable doubt that : (1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of unlawful activity; (3) the property involved was in fact the proceeds of the specified unlawful activity;

> and (4) the defendant conducted the financial transaction "with the intent to promote the carrying on of [the] specified unlawful activity."

A fifth element of proof can be proven in four alternative ways under §1956(a)(1); (A)(i), (A)(ii), (B)(i) or (B)(ii). The Government in Smart's case chose to indict him under (A)(i) *and* (B)(i), "promotion" and "concealment". In contrast to section (B)(i) which requires only that the potential money launderer know that the ensuing transaction is designed by the criminal to conceal the nature of the proceeds, section (A)(i) mandates proof of a specific intent to promote the underlying activity. *See* Conley at 980-81 (3d Cir. 1994).

The prosecution's case was that Smart, in conjunction with others, was "fronted" methamphetamine, sold it and later gave the drug proceeds to the supplier. Smart was identified by a middleman, Arturo Castrejon, who did not speak English, who claimed he had delivered drugs and picked up money from Smart. He did not know Smart's name, but simply identified him as "John Deere" because of the John Deere mailbox at the entrance to his farm. Castrejon could not recall how often or how much money he had been paid. Except for law enforcement, the only other witnesses who testified against Smart were either indicted co-conspirators or paid informants. Smart, along with numerous character witnesses, testified. He was found *not guilty* of the underlying possession charge, but was found guilty of the money laundering charge.

The basis for the money laundering charge was the "fronting" of drugs and the later payment for them to the drug supplier by the drug dealer. This, the prosecution claimed, created goodwill for the drug supplier to continue to supply the drugs for later payment.

B. Deprivation of due process and equal protection by the trial court's and the Eleventh Circuit Court of Appeals' failure to follow other circuits who have decided this issue according to Congress's legislative intent.

The Petitioner filed a "Defendant's Addendum to PSI and Renewed Motion for Judgment of Acquittal" with the trial court on February 17, 2004. This was a supplement to his "Motion for Judgment of Acquittal" which was filed on September 22, 2003. In his Addendum he argued that the "transactions or transactions that created the criminally derived proceeds must be distinct from the money laundering transaction because the money laundering statutes criminalize 'transactions in proceeds, not the transactions that created the proceeds.' (quoting United States v. Mankarious, 151 F.3d 694 (7th Cir. 1998)." (Addendum at p. 2) In that Addendum, Smart also cited the court to other Circuits who have held similarly in money laundering cases. The trial court denied the motion on July 22, 2004, on jurisdictional grounds without addressing the merits.

In 1986, Congress passed the Money Laundering Control Act (MLCA) as part of the Anti-Drug Abuse Act. The "Promotion Statute" criminalizes financial transactions in which criminals spend their gains "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. §1956(a)(1)(A)(i). The question among the Circuits arises as the when the unlawful activity is completed or when does "promotion" occur. To answer this question, one must look to Congress's intent when passing the law.[1]

---

[1] For a more thorough treatise on the MLCA, See Maura E. Fenningham, *A Full Laundering Cycle is Required: Plowing Back the*

When doing so, it is clear that Congress intended to stop the flow of illicit profits back to the criminal enterprise to prevent the expansion and capitalization of criminal activity. Section 1956(a)(1)(A)(i) does *not* designate "promotion" to "completed" unlawful activity as some Circuits have held.

Congress had a two-edged intention when formulating the MLCA. One was to stop persons who assisted the criminals in laundering their money, thereby promoting their illegal activities, and the second, was to make money laundering a separate crime from the underlying criminal offense. By looking at the Senate Report, it is clear that these are the intentions of Congress. One congressional sponsor of the MLCA stated:

> The only way we will get at this problem is to let the whole community, the whole population, know that they are part of the problem and they could very well be convicted of it if they knowingly take these funds. If we can make a drug dealers money worthless, then we have really struck a chord, and we have hit him where he bruises, and that is right in the pocketbook.[2]

The Senate Report is very clear that Congress wanted to fill a gap in criminal law in the area of post-crime hiding of assets derived from the underlying criminal activity.[3] Several Circuits have reached their holdings based on Congressional intent.

Proceeds to Carry on Crime IS the Crime Under 18 U.S.C. §1956(a)(1)(A)(i), 70 Notre Dame L. Rev. 891 (1994-95)

[2] H.R. Rep. No. 855, 99th Cong., 2d Sess. 13 (1986), note 13, at 13.

[3] S. Rep. No. 433, *supra*, note 3, at 1-4.

In Dimeck, the Tenth Circuit analyzed the congressional intent of §1956(a)(1) as a whole. Dimeck's conviction was based on the delivery of alleged drug money to another person who was to deliver it to the seller of the drugs. The Tenth Circuit concluded that this drug courier's type of conduct was not what the legislature was prohibiting under §1956(a)(1)(B)(i). The court's analysis of §1956(a)(1) looked to the congressional intent.

The court stressed that the statute was created to provide a new federal offense for money laundering, rather than to "afford an alternative means of punishing the prior 'specified unlawful activity.'" Dimeck at 1244 (quoting United States v. Edgmon, 952 F.2d 1206, 1213-14 (10th Cir. 1991). "Congress intended simply to add a new criminal offense to punish activity that was not previously punished criminally." *Id.* at 1239 (quoting Edgmon at 1213-14). They dissected the defendant's conduct and concluded that it was not designed to disguise or conceal the attributes of the illegal proceeds.

The Fourth Circuit declined to extend §1956(a)(1)(A)(i) to the transfer of money orders which represented the proceeds of a drug sale to a DEA agent. The defendant in Heaps, supplied "ecstasy" or methlendioxyamphetamine, to other distributors, who resold the pills. Heaps had his customers send him money orders in his girlfriend's name for the "fronted" pills. The government asserted that the transfers were to establish and promote goodwill for the future supply of ecstasy. The Fourth Circuit, however, rejected this theory of "promotion" stating that the payments were merely to satisfy a debt owed and were a completion of a transaction. They stated that this particular transaction was not the kind contemplated by Congress in enacting §1956(a)(1)(A)(i). The money orders were simply payments for the sale of ecstasy, a crime for which the defendant was already charged and convicted.

The court stated that if the acceptance of money for payment of drugs was the kind contemplated under the money laundering statute, then "virtually every sale of drugs would be an automatic money laundering violation as soon as money changed hands." *Id.* at 485-86. This would, in effect, criminalize the same conduct already punished by the drug statutes. Congress did not have this intent. Rather, their intent was to prevent conduct "other than those already prohibited by other laws." *Id.* at 486.

The Seventh Circuit reached the same conclusion in Mankarious, holding that transactions that create the criminally-derived proceeds must be distinct from the money-laundering transactions, because the money-laundering statutes criminalize "transaction[s] in proceeds, not the transaction[s] that create[] the proceeds." *Id.* at 705.

The Fifth Circuit went a step further in Dovalina, and held that "[A] promotion money laundering offense cannot be established merely by evidence of a single buyer's repeated payments to a distributor." *Id.* at 476.

These Circuit's holdings conflict with the holdings of the Second, Third, Sixth and Ninth Circuits. The Sixth Circuit concluded that "[p]ayment for drugs may constitute 'promotion' for the purposes of the money laundering statute when such payment encourages further drug transactions." King at 1039.

In Baker, the Ninth Circuit stated: "The government presented abundant evidence of payment [the defendant] made...for the purchase of contraband cigarettes. [The defendant] could not have continued the illegal trafficking without paying his cigarette suppliers." *citing* Montoya at 1976.

The Second Circuit concluded that the "language [of §1956(a)(1)(A)(i)] applie[s] to the transportation of money orders to pay for purchases of cocaine." Piervinanzi at 681.

The Third Circuit concluded "that Congress did intend to impose a further punishment under §1956 for using the proceeds of an illegal gambling business to promote that illegal activity." Conley at 972.

The conflict among the Circuits as to their interpretation of §1956(a)(1)(A)(i) needs resolution and presents a substantial question justifying Supreme Court review.

C. The Eleventh Circuit's failure to reach this issue in Smart's case allows them to be in conflict with their previous decisions without issuing an opinion on this specific issue and gives the prosecution an unfair second "bite at the apple" when they fail to prove the underlying drug charge, thereby subjecting the defendant to being punished for the same conduct for which he was found not guilty.

The Eleventh Circuit's affirmance of Smart's conviction, without issuing an opinion on this matter, in effect, allows them to conflict with their previous decision in Christo.

> In construing §1956, we have determined that *money laundering must be punished separately from an underlying criminal offense, and therefore the underlying offense must have been completed before any act of laundering can occur.* See United States v. Christo, 129 F.3d 578, 579-80 (11th Cir.

> 1997)(per curiam). While we have decided that financial transactions involving illegally obtained funds which advance ongoing criminal conspiracies constitute money laundering under §1956, see, e.g., United States v. Carcione, 272 F.3d 1297, 1303 (11th Cir. 2001), we have not decided in the context of "fronting" drugs when the underlying offense has been completed and, consequently, whether the subsequent payment of proceeds so that the dealer can continue to receive drug shipments to sell on consignment constitutes laundering. (emphasis added)

Opinion on United States v. Smart at p. 10, note 5 (unpublished) (See Appendix A-1, p.x, note 5)

In fact, the Court in *dictum* stated:

> [v]iewed in the light most favorable to the government, we conclude that a rational trier of fact could have concluded that Smart's payments of money constituted transactions involving proceeds from his sale of methamphetamine which was given to him by Arturo Castrejon and that these payments were made so that Smart would continue to receive drug shipments from Castrejon. Accordingly, there was sufficient evidence to support Smart's conviction for money laundering under §1956(a)(1)(A)(i).

Opinion on United States v. Smart at p. 13 (unpublished) (*See* Appendix A-1, p.xii)

By not reaching a holding on this issue, the government in this case, was allowed to convict Smart on the money laundering charge when he was found not guilty of the underlying criminal offense of conspiracy to possess with the intent to distribute. In essence, the jury said he was not involved in the drug distribution but that he laundered money by paying for drugs that had been "fronted" to him. Congress did not intend for this result or for §1956(a)(1)(A)(i) to be a "tag-along charge" to the substantive charge.[4]

If every drug sale is an automatic money laundering violation when the money changes hands, then the money laundering statute becomes a money spending statute. This is inconsistent with congressional intent. This would criminalize the same conduct as the drug laws which prohibit the underlying crime. This court should address the issue and clarify §1956(a)(1)(A)(i).

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

TAMERA K. ERSKINE*
101 Park Place Way
Alabaster, Alabama 35007
(205) 620-1233

Counsel of Record *Attorney for Petitioner*

---

[4] Peter J. Kacarab, *An Indepth Analysis of the New Money Laundering Statutes*, 8 Akron Tax J. 1, note 39 at 18 (1991). The author notes that "Congress' intent...was to provide an indirect means for the government to investigate such criminal activity and organizations by criminalizing certain transactions conducted with the proceeds of illegal activities."

OF COUNSEL:
RANDY A. DEMPSEY
Dempsey, Steed, Stewart,
Maddox & Gache, LLP
1122 22nd Street North
Birmingham, Alabama 35234
(205) 328-0162

APPENDIX

TABLE OF APPENDICES

Page

Appendix A-1
Opinion of the United States Court of Appeals for the Eleventh Circuit, Dated and Filed June 16, 2005.....iii

Appendix A-2
Order of the United States Court of Appeals for the Eleventh Circuit, Dated and Filed August 25, 2005, denying Petition for Rehearing *En Banc*.....xv

Appendix A-3
Order of the United States Court of Appeals for the Eleventh Circuit, Dated and Filed October 11, 2005, denying Motion to Recall Mandate and Stay Execution.....xvi

A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12245
Non-Argument Calendar

Filed
June 16, 2005

D.C. Docket No. 03-00085-CR-CO-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

BOBBY RAY SMART,
a.k.a. John Deere,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Alabama

(June 16, 2005)

Before BIRCH, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

Bobby Ray Smart, a.k.a. John Deere, appeals his conviction and 151-month sentence for conspiracy to commit money laundering, in violation of 18 U.S.C. §§1956(a)(1)(A)(i), 1956(h). On appeal, Smart argues that the district court erred by denying his motions for judgment of acquittal because the evidence submitted to the jury was insufficient to support his conviction. In addition, smart argues that the district court erred by denying his motion for

a downward departure from the sentencing range established by the Sentencing Guidelines. Because there was sufficient evidence presented to the jury on the money laundering conspiracy charge and because the district court did not err at sentencing, we **AFFIRM.**

I. BACKGROUND

In May 2003, a federal grand jury returned an indictment charging Smart, along with several other individuals, with conspiracy to possess with the intent to distribute more than 500 grams of methamphetamine and conspiracy to commit money laundering. Smart entered a plea of not guilty on both counts and the case proceeded to trial before a jury.

The government began its case with the testimony of David Fowler, an agent with the Drug Enforcement Agency ("DEA"), who testified that he and other DEA agents began investigating in August 1999 a group they suspected was trafficking methamphetamine. The agents suspected Rafael Antonio Aguilar (a.k.a. "Big Tony"), an illegal alien living in California, was responsible for supplying large quantities of the drug to Blount County, Alabama. According to the DEA, Big Tony had three people who would receive drug shipments in Alabama and subsequently deliver the drugs to dealers for distribution. One of Big Tony's three Alabama-based receivers was Arturo Castrejon.

Although Castrejon was indicted along with Smart, he pled guilty and testified as a witness for the government. Castrejon testified that Big Tony had introduced him to Smart in 2001 so that he could deliver drugs to Smart. When they were introduced, Castrejon knew Smart only as "John Deere." Castrejon testified that this pseudonym was derived from the fact that Smart had a John Deere mailbox in front of his house. Castrejon testified that he recalled delivering methamphetamine to Smart's house at least four

times. He stated that sometimes Smart would pay him when the drugs were delivered and sometimes he would not. Agent Fowler later testified that this practice, called "fronting," was typical in the drug trafficking business. Fowler stated that distributors would give, or "front," the drugs to dealers on consignment, and then the dealers would pay the distributors the proceeds from the sale of the first delivery of drugs when additional shipments were delivered. To support this testimony, Castrejon described how, in March 2002, he consented to a search of his house by DEA agents. He testified that the agents found, inter alia, a ledger book and approximately $80,000. He testified that the ledger book contained an entry listing "John Deere" and "7,000," which signified that Smart paid Castrejon $7,000 for a drug delivery. Castrejon further testified that the next line on the ledger was dated 16 July 2001 and read "mas uno" and "3000," which meant that Smart received an additional pound of methamphetamine and paid him an additional $3,000. Castrejon could not recall whether the payments noted in the ledger were for drugs that had been previously delivered or for drugs that wee exchanged that day. While these were the only two recorded transactions between Smart and Castrejon, Castrejon testified that there were others which he did not record in the ledger. After the March 2002 search, Castrejon was arrested and placed in jail.

Next, the government offered testimony of Becky Castro, who worked with Castrejon's wife, Aneli Castrejon, and Terry Faucett. Following Castrejon's arrest, Castro testified that Aneli came to her house to ask for Castro's help to get the money together to bail Castrejon out of jail. Aneli indicated to Castro that she wanted to go to Smart's house to collect on money she knew Smart owed her husband. Following this encounter, because they did not want to be involved in any illegal activity, Castro and Faucett reported to local police authorities what Aneli had said. Local police referred them to the DEA, and Castro and

Faucett subsequently agreed to be informants for the DEA. On 13 April 2002, after becoming DEA informants, Castro and Faucett accompanied Aneli to Smart's house to ask for the money Castrejon was owed. They traveled in Castro's car because Castro's husband, Efrain, worked for Smart and therefore Smart would recognize their car. Castro testified that Smart told them to come back in a few days when he would have the money. Within a week, Aneli called Castro and indicated that Smart had the money owed to Castrejon. Castro and Faucett then returned to Smart's house and received from him an envelope containing $7,000 and a note which read: "I owed 10,000. Here's 7,000. I already paid restaurant man 3,000. We're even for now."[1] R5-319 at 138. The envelope was addressed to "Efrain" so that it appeared as though the money was to be given to Efrain Castro as his wages for the legitimate work he performed for Smart. Castro and Faucett then took the envelope to Aneli Castrejon.

Aneli Castrejon, like her husband, was indicted for participation in the methamphetamine conspiracy, pled guilty, and testified for the government. She testified that she had accompanied her husband to Smart's residence two times prior to going to the residence with Castro and Faucett. She admitted that she went to Smart's house with Castro and Faucett at her husband's direction to secure money that was owed to him and that would eventually be paid to Big Tony for the drugs he supplied. Aneli also testified that she contracted for the use of four cellular telephone numbers, one of which she used, another of which

---

[1] Steven Drexler, a government witness who testified as an expert in handwriting analysis, testified that he had a "90 percent confidence level" that the note was written by Smart. R6-319 at 314. According to the government, the mention of "restaurant man" in the note was a reference to Arturo Castrejon, who owned a Mexican restaurant. Appellee's Br. At 12 n.5 (citing R5-319 at 99).

her husband used, and two of which Big Tony and her husband used.[2]

After the government had finished presenting its case in chief, Smart moved for judgment of acquittal on both of the counts for which he was indicted because "no rational trier of fact could have found [Smart] guilty beyond a reasonable doubt" based on the evidence presented. R6-319 at 384. The district court denied the motion. At the close of all evidence, Smart renewed his motion for judgment of acquittal because "the evidence [was] insufficient to sustain a verdict." R7-319 at 479. Smart's motion was again denied. The case was then given to the jury which, on 12 September 2003, acquitted Smart of conspiracy to possess with the intent to distribute methamphetamine, but found him guilty of conspiracy to commit money laundering.

Subsequently, a probation officer compiled a presentence investigation report (PSR) and recommended, based on the Sentencing Guidelines ("Guideline"), a sentencing range of 151 to 188 months of imprisonment. On 17 February 2004, after Smart had already lodged his objections to the PSR, Smart filed a motion to augment his objections to the PSR in which he requested a downward departure at sentencing and renewed his motion for judgment of acquittal on the grounds that his conduct did not constitute criminal money laundering as a matter of law. The district court denied Smart's motion for a downward departure. The district court noted that, while the Sentencing Guidelines "permit me to vary from them in a downward departure under specific circumstances," the evidence presented by Smart, such as "being a good person,

---

[2] Agent Fowler subsequently testified about phone records the DEA obtained which indicated that calls had been made from the telephone numbers described by Aneli to telephone numbers associated with Smart. In addition, Fowler testified that records he obtained regarding a cellular telephone contract signed by Big Tony listed Smart as Big Tony's employer.

helping out the family, [and being] a good church member, "did not warrant a downward departure. R9-322 at 25-26. Rather than ruling on the renewed motion for judgment of acquittal, the district court directed the government to file a response to the motion and indicated that Smart could argue his motion at a subsequent bond hearing. The district court then sentenced Smart to 151 months of imprisonment, the minimum under the applicable Guidelines range. Subsequently, without hearing argument, the district court dismissed Smart's renewed motion for judgment of acquittal because it found the motion was not timely filed.

Smart now appeals his conviction and sentence. He argues that the evidence presented by the government was insufficient, as a matter of law and as a matter of fact, to support his conviction. He also argues that the district court erred at sentencing. We address each argument in turn.

II. DISCUSSION

A. Money Laundering Conviction

Section 1956 of Title 18 of the United States Code provides criminal liability for any person who knowingly conducts a financial transaction which involves the proceeds of some unlawful activity with the intent to promote the carrying on of unlawful activity. 18 U.S.C. §1956(a)(1)(A)(i).[3] The statute defines the term "transaction" as any "purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition." §1956(c)(3). Construing this statute, we have determined that, to obtain a conviction for violating §1956(a)(1)(A)(i), the government bears the burden of proving beyond a reasonable doubt that:

---

[3] Section 1956(h) provides for liability for any person who conspires to commit unlawful money laundering as defined in §1956. 18 U.S.C. §1956(h).

> (1)the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of unlawful activity; (3) the property involved was in fact the proceeds of the specified unlawful activity; and (4) the defendant conducted the financial transaction 'with the intent to promote the carrying on of [the] specified unlawful activity.'

United States v. Calderon, 169 F.3d 718, 721 (11th Cir. 1999) (citation omitted).

Based on these standards, we turn to Smart's two arguments that there was insufficient evidence to support his money laundering conviction. First, he argues for the first time on appeal that proof he paid money to a drug supplier cannot support his conviction as a matter of law because proof of money laundering must be separate from the proof required for conviction of the underlying offense of drug trafficking.[4] Second, Smart contends that the evidence presented to the jury was insufficient to meet the government's burden.

1. Sufficiency of the Evidence as a Matter of Law

When a defendant appeals a district court's denial of a motion for judgment of acquittal based on an issue that was not raised in the district court, we review for plain error.

---

[4] Smart first argued that his conduct did not amount to illegal money laundering as a matter of law in his renewed motion for judgment of acquittal. That motion, however, was denied because it was untimely. Because the raising of an issue in an untimely motion in district court is insufficient to preserve the issue for appeal, see United States v. Viscome, 144 F.3d 1365, 1370 (11th Cir. 1998), we consider Smart's insufficiency as a matter of law argument as being raised for the first time on appeal.

See United States v. Hunerlach, 197 F.3d 1059, 1068 (11th Cir. 1999). Our power to review for plain error is "limited" and "circumscribed." Id. (citation omitted). To satisfy the plain-error standard, we must find that (1) the district court committed error, (2) the error was plain or obvious, and (3) the error affected substantial rights. United States v. Cotton, 535 U. S. 625, 631, 122 S.Ct. 1781, 1785 (2002). If all three conditions are met, we may exercise our discretion to correct the error if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id.

Assuming without deciding whether the district court committed error, we conclude that Smart's claim of insufficiency as a matter of law fails under the second prong of the plain error test. As Smart correctly observes, our court has not decided whether the payment of money by a drug dealer to a drug supplier for drugs that were previously "fronted" to the dealer on consignment, as alleged in this case, constitutes money laundering under §1956(a)(1)(A)(i).[5] Other circuit courts addressing this issue, however, have split on whether payments to a supplier pursuant to a "fronting" arrangement can be considered laundering. Compare United States v. King, 169 F.3d 1035, 1039 (6th Cir. 1999) ("Payment for drugs may constitute 'promotion' for the purposes of the money laundering statute when such payment encourages further drug transactions."); United States v. Baker, 63 F.3d 1478, 1494

---

[5] In construing §1956, we have determined that money laundering must be punished separately from an underlying criminal offense, and therefore the underlying offense must have been completed before any act of laundering can occur. See United States v. Christo, 129 F.3d 578, 579-80 (11th Cir. 1997)(per curiam). While we have decided that financial transactions involving illegally obtained funds which advance ongoing criminal conspiracies constitute money laundering under §1956, see, e.g., United States v. Carcione, 272 F.3d 1297, 1303 (11th Cir. 2001), we have not decided in the context of "fronting" drugs when the underlying offense has been completed and, consequently, whether the subsequent payment of proceeds so that the dealer can continue to receive drug shipments to sell on consignment constitutes laundering.

(9th Cir. 1995) (stating that paying a supplier was laundering which "promotes" the carrying on of the unlawful activity because the defendant "could not have continued the illegal trafficking without paying his...suppliers"); United States v. Torres, 53 F.3d 1129, 1137 n.6 (10th Cir. 1995) (finding that using proceeds from the sale of drugs "fronted" to a dealer to buy more drugs "satis[fied] the 'promotion' element of 1956(a)(1)(A)(i)"), with United States v. Dovalina, 262 F.3d 472, 476 (5th Cir. 2001) (concluding that a "promotion money laundering offense cannot b established merely by evidence of a single buyer's repeated payments to a distributor"); United States v. Heaps, 39 F.3d 479, 485 (4th Cir. 1994) (reversing a conviction for money laundering and noting that "[w]ere the payment for drugs itself held to be a transaction that promoted the unlawful activity of that same transaction[,] virtually every sale of drugs would be an automatic money laundering violation as soon as money changed hands"). We have held that, "where neither the Supreme Court nor this Court has ever resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue." United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (per curiam). Accordingly, because it is not clear under current law whether a money laundering offense has been committed when a drug dealer gives drug sale proceeds to a drug supplier for previously "fronted" drugs so that additional shipments can be obtained, it was not plain error for the district court to deny Smart's motions for judgment of acquittal where he failed to raise the issue before the district court. Smart's claim that there was insufficient evidence as a matter of law to support his money laundering conviction thus fails under the second prong of the plain error test.

2. Sufficiency of the Evidence as a Matter of Fact

We review de novo a defendant's claim of insufficient evidence in fact to sustain a conviction. See United States v. Christo, 129 F.3d 578, 579 (11th Cir. 1997)

(per curiam). In making this determination, we "view the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor." See id. (citation omitted). Under this standard, we are required to affirm a conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (citation omitted).

Based on this standard, we reject Smart's contention that the government failed to present facts which proved its case on the money laundering charge. The evidence demonstrated that Smart made at least three payments: one in the amount of $7,000 to Castrejon in early 2001, one in the amount of $3,000 to Castrejon in July 2001, and another payment in the amount of $3,000 to Castro in 2002 for money he owed to Castrejon. Moreover, the government presented evidence which indicated that Smart was involved in the trafficking of methamphetamine with Castrejon and Big Tony. In addition, the government described the process of "fronting," in which drugs were given to dealers to be sold on consignment and then the proceeds were paid to suppliers in exchange for the continued receipt of subsequent drug shipments. Viewed in the light most favorable to the government, we conclude that a rational trier of fact could have concluded that Smart's payments of money constituted transactions involving proceeds from his sale of methamphetamine which was given to him by Arturo Castrejon and that these payments were made so that Smart would continue to receive drug shipments from Castrejon. Accordingly, there was sufficient evidence to support Smart's conviction for money laundering under §1956(a)(1)(A)(i).

B. Downward Departure

Next, Smart argues that the district court erred at sentencing by denying his motion for a downward departure

based on his de minimis role in the overall drug trafficking conspiracy because the court misunderstood its authority to depart downward. While we "generally may not review the merits of a district court's refusal to grant a downward departure, [we] may conduct a de novo review of a defendant's claim that the district court mistakenly believed it lacked the authority to grant such a departure." United States v. Mignott, 184 F.3d 1288, 1290 (11th Cir. 1999) (per curiam). When nothing in the record indicated otherwise, we will assume that the district court understood it had the authority to depart downward, thus precluding review. See United States v. Chase, 174 F.3d 1193, 1195 (11th Cir. 1999).

Our review of the sentencing record demonstrates that the district court was not mistaken about its authority to make a downward departure based on a defendant's de minimis role. The district court noted that Smart articulated two reasons why his case merited a downward departure: (1) he was a good person and was active in the community; and (2) he had a minor role in a larger drug trafficking conspiracy. With regard to the first reason, the district court was unclear as to whether the Guidelines permitted a downward departure. See R9-322 at 26. Because Smart's appeal is limited to the district court's denial of a downward departure based on his de minimis role, however, this lack of clarity is irrelevant to our inquiry in the instant appeal. Rather, we focus on the district court's analysis of Smart's claim that he was entitled to a downward departure based on his minor role. With regard to this argument, the district court tacitly acknowledged that it had the authority to depart downward from the Guidelines because it unambiguously stated that a downward departure was not merited based on the facts of Smart's case. See id. As a result, we are precluded from reviewing the district court's refusal to make a downward departure in sentencing Smart. See United States v. Harness, 180 F.3d 1232, 1237 (11th Cir. 1999) (finding that it lacked jurisdiction to review a district

court's denial to make a downward departure where the district court recognized its authority to downwardly depart but refused to exercise its discretion to do so based on the facts of the case).

III. CONCLUSION

Following Smart's conviction of conspiracy to commit money laundering, the district court sentenced Smart to 151 months of imprisonment. In reviewing his conviction and sentence, we have rejected his claims that there was insufficient evidence as a matter of law and as a matter of fact to support his conviction and that the district court erred at sentencing by refusing to grant a downward departure. Accordingly, Smart's conviction and sentence are **AFFIRMED.**

A-2

IN THE UNITED ST .TES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12245-II

FILED
AUG 25 2005

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BOBBY RAY SMART,
a.k.a. John Deere,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

Before: BIRCH, CARNES and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

A-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12245-II

FILED
OCT 11 2005

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BOBBY RAY SMART,
a.k.a. John Deere,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Alabama

ORDER:

Appellant's "Motion to Recall Mandate and Stay Execution" is DENIED. The mandate, once issued, may not be recalled except in extraordinary circumstances. See Calderon v. Thompson, 523 U.S. 538, 549-550, 118 S.Ct. 1489, 1498 (1998). Appellant may file a petition for certiorari notwithstanding issuance of the mandate. See 28 U.S.C. §2101(c); S.Ct.R. 13(1) and (3).

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE